

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 215 of 1999

with

Civil Application No.3504 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO
1 to 5 No

BALVANTRAI KALIDAS MEHTA

Versus

UNITED COMMERCIAL BANK

V.S. HOSPITAL BRANCH

Appearance:

MR NIRAV C THAKKAR for appellant

Respondents served.

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 23/06/1999

ORAL JUDGEMENT

1. When the matter was called out, learned advocate Mr. Nirav C. Thakkar for the appellant has filed affidavit of service, which, inter alia, discloses that the appellant himself has personally effected the service of notice to the respondents - bank. The said affidavit of service is ordered to be retained on the record of

this case.

2. Upon the request made by learned advocate Mr. Nirav C. Thakkar for the appellant and since the point involved in this appeal is in a narrow compass and is covered by the judgment of this Court (Coram: Y.B. Bhatt, J.) dated 18.3.1999 recorded in Appeal from Order No. 129 of 1999, the matter is taken up for final hearing today itself.

3. In this Appeal from Order, the appellant herein has brought in challenge the order passed by the learned Judge, City Civil Court (Court No.25) dated 26.3.1999 recorded below Ex.6, notice of motion, which was taken out by the appellant/plaintiff in Regular Civil Suit No. 870 of 1999, dismissing the notice of motion and refusing to grant injunction restraining the respondents/defendants from deducting 50% amount from the salary of the appellant/plaintiff in his capacity as a guarantor of the principal borrower - Natwarlal Shukla.

4. The appellant is the original plaintiff while the respondents are the original defendants. Hence, for the sake of convenience and brevity, the parties are hereinafter referred to as the 'plaintiff' and the 'defendants'.

5. The suit in question was filed by the plaintiff, wherein, inter alia, it was averred that he is a permanent employee of the defendant bank for last many years. In 1991 when he was serving in its Bhadra Branch, one Natwarlal Shukla, Proprietor of M/s. S.T. Electronics, had applied for cash credit loan from the defendant bank and he was granted loan to the extent of Rs.25,000 for which the plaintiff stood as a guarantor. It was further the case of the plaintiff in the lower court that a sum of Rs.55,539 was due from said Natwarlal Shukla and, therefore, the defendant bank served a notice to Natwarlal Shukla calling upon him to pay the amount within a period of seven days from the date of service of notice. During inquiry it was revealed that said Natwarlal Shukla died before some time. However, Shri Tusharbhai Shukla, who happens to be the son of deceased Natwarlal Shukla, has shown his willingness to repay the amount due from his father Natwarlal Shukla.

6. It was further the case of the plaintiff that in spite of the above stated facts and the willingness shown by Shri Tusharbhai Shukla, who is the son of principal borrower, the defendant bank has by its letter dated 1.2.1999 decided to deduct 50% of the salary of the

plaintiff for adjusting the outstanding dues from Natwarlal Shukla for whom the plaintiff stood as a guarantor. It was the case of the plaintiff that the defendant bank was not entitled to deduct the amount straightway from his salary before filing a civil suit in a competent court and without getting order of attachment of the hypothecated cassettes of Natwarlal Shukla. Therefore, according to the plaintiff, the said action of the defendant bank of deducting the amount from the salary of the plaintiff is illegal and, therefore, the defendants are required to be restrained from deducting the amount from the salary of the plaintiff. The said action of the defendant bank was challenged before the lower court by filing a suit. Alongwith the suit, the plaintiff has also moved a notice of motion application wherein, inter alia, it was prayed that the defendant bank be restrained from deducting his salary to the tune of 50% as per the letter dated 1.2.1999.

7. The defendant bank appeared and contested the suit as well as the notice of motion application whereby injunction was sought for. The defendant has, inter alia, denied the averments made by the plaintiff and reiterated that since the plaintiff stood as a guarantor, the bank was legally entitled to recover the amount by exercising the banker's right of general lien and set off. It was further contended by the learned advocate for the defendant bank that even under the continuing guarantee agreement, the plaintiff had specifically agreed that notwithstanding the fact that no proceedings are initiated by the bank against the principal borrower, the guarantor shall be liable to pay the debt due to the bank. Ultimately it was contended that the application of the plaintiff for injunction was devoid of any merits and required to be dismissed with costs.

8. After hearing the learned advocates for both the parties, the learned Judge, City Civil Court, Ahmedabad has recorded his findings as under:

(i) That, as per Section 128 of the Indian Contract Act, liability of the surety is co-extensive with that of principal debtor unless it is otherwise provided by the contract and as such there was no agreement contrary to it and consequently it was not open for the plaintiff to contend that without exhausting remedy from the principal debtor, the amount cannot be recovered from him;

(ii) That the plaintiff has executed a letter

of continuing guarantee at Mark 13/2 whereby the plaintiff has specifically agreed that notwithstanding the fact that no proceedings are initiated by the bank against the principal borrower, the guarantor shall be liable to pay the debt due to the bank and, therefore, by relying upon said Mark 13/2 it cannot be said that the defendant is not entitled to recover the amount from the salary of the plaintiff.

In view of the aforesaid findings, the learned Judge, City Civil Court, Ahmedabad, dismissed the notice of motion application and refused to grant injunction as prayed for.

9. Learned advocate Mr. Nirav C. Thakkar for the appellant/plaintiff has assailed the order of the learned Judge, City Civil Court, Ahmedabad, by raising following contentions:

- (a) That the defendant bank should have first initiated recovery proceedings against the principal debtor and the plaintiff guarantor and after getting a decree ought to have tried to satisfy the decree against the estate of the principal debtor - deceased represented by heirs of the principal debtor before taking any action against the plaintiff who was a guarantor.
- (b) That the trial Court has failed to appreciate the willingness of the son of the principal debtor Shri Tusharbhai Shukla who was ready and willing to pay the outstanding dues of the bank in two instalments.
- (c) The action of the bank is wholly illegal since no opportunity of being heard was given to the plaintiff.
- (d) By filing the Civil Suit against the principal debtor the defendants should have taken attachment of video cassettes which were hypothecated to the bank and could have set off the debt of the bank under the loan.
- (e) The plaintiff did not stand as a guarantor under the loan in the capacity of the employee of the bank and hence the bank had no power to withhold the salary of the plaintiff as an employee under the guise of outstanding dues of the bank for the loan granted to the principal debtor.

(f) Lastly, he contended that without obtaining decree against the principal debtor, the bank is not empowered to withhold the salary of the guarantor of the principal debtor.

In view of the aforesaid submissions, Mr. Thakkar, learned advocate for the plaintiff, has strenuously contended that the order passed by the learned trial Judge is vulnerable and not in accordance with law and the same is contrary to the judgment of this Court recorded in Appeal from Order No. 129 of 1999. He further submitted that the judgment of this Court recorded in Appeal from Order No. 129 of 1999 was brought to the notice of the learned trial Judge. In spite of that the learned trial Judge has passed the impugned order by ignoring the ratio laid down in the said judgment. In these circumstances, learned advocate for the appellant/plaintiff has urged that the order passed by the learned trial Judge is required to be quashed and set aside by allowing the appeal and thereby granting the injunction as prayed for.

10. In view of the aforesaid submissions, now let us examine the case on hand. So far as the instant case is concerned, the facts are identical. The plaintiff is an employee of the defendant bank. No doubt, he stood as a guarantor of the principal borrower. It is also true that he has executed a letter of continuing guarantee which is produced at Mark 13/2 whereby the plaintiff has specifically agreed that notwithstanding the fact that no proceedings are initiated by the bank against the principal borrower, the guarantor shall be liable to pay the debt due to the bank. In my view, in spite of the above letter of continuing guarantee executed by the plaintiff, it is obligatory on the part of the bank to file a civil suit against the principal borrower as well as the plaintiff who stood as a guarantor and, in that suit, the bank can definitely obtain an order from the court for attachment of salary of the plaintiff. By taking recourse to that procedure, bank can deduct amount from the salary of its employee. So far as the instant case is concerned, the son of the principal borrower has shown his willingness to pay the entire amount due from his father to the bank. I am, therefore, of the opinion that the impugned order is not justifiable in the facts and circumstances of the case. It is merely a coincidence that the plaintiff, who stood as a guarantor, happens to be an employee of the bank and drawing his salary from the bank. As he has executed a letter of continuing guarantee, that fact itself does not confer

any right on the bank to recover the loan given to principal borrower - Natwarlal Shukla by way of deducting the amount from the salary of the plaintiff who happens to be an employee of the bank.

11. So far as the judgment delivered by this Court (Coram: Y.B. Bhatt, J.) in Appeal from Order No. 129 of 1999 is concerned, on having perusal of the said judgment it could be seen that similar question arose before this Court for determination. In the said judgment the plaintiff who stood as a guarantor of the principal borrower was an employee of the bank and he could obtain ad-interim injunction in his favour restraining the defendant bank from deducting any amount from his salary in his capacity as a guarantor and against this order the Appeal from Order was preferred by the United Commercial Bank. While dismissing the said Appeal from Order, this Court has observed that what is material in the instant case is that the bank has sought to exercise its so-called rights not against the guarantor, but against its employee. It is a mere coincidence that the guarantor happens to be an employee. Obviously, if the plaintiff were not an employee of the bank, he would not be drawing his salary from the bank, and in that case the bank would not be in a position to make any deducting from his salary. Thus, the bank is able to make deductions from the salary of the plaintiff not because he is a guarantor, but merely because he happens to be an employee of the bank. The point raised for determination of this court in this Appeal from Order is squarely covered by the decision of this Court (Coram: Y.B. Bhatt, J.) rendered in Appeal from Order No. 129 of 1999.

12. In view of the aforesaid discussion and the case law relied upon by the learned advocate Mr. Thakkar for the appellant/plaintiff, I am of the opinion that the learned trial Judge has passed the impugned order without considering the decision of this Court in Appeal from Order No. 129 of 1999 dated 18.3.1999 which was also placed before him for reliance and, therefore, the order recorded by the learned trial Judge is bad in law and is liable to be quashed and set aside by allowing this Appeal from Order and granting injunction against the defendant bank by restraining them from deducting 50% of the amount from the salary of the plaintiff.

13. In the premise, the order dated 26.3.1999 recorded by the learned Judge, City Civil Court (Court No.25), below Ex.6 in Regular Civil Suit No.870 of 1999 is hereby quashed and set aside and the

defendant/respondent bank is hereby restrained from deducting 50% amount from the salary of the plaintiff for adjusting the outstanding dues of the principal debtor - Natwarlal Shukla.

14. At this stage, learned advocate Mr. Thakkar for the appellant/plaintiff has drawn my attention to Civil Application No. 3504 of 1999 which is filed alongwith the Appeal from Order, wherein it is specifically contended that the defendant bank has deducted 50% of the salary of the plaintiff for the months of February and March 1999 and, therefore, a prayer is made that the respondent/defendant bank may be directed to refund the said amount to the plaintiff with interest. In view of the fact that the impugned order passed by the learned trial Judge is quashed and set aside, the said prayer is required to be granted. Hence, the defendant/respondent bank is directed to refund the amount deducted from the salary of the plaintiff during the month of February and March 1999, forthwith.

15. In the result, this Appeal from Order is allowed to the aforesaid extent. However, there shall be no order as to costs.

16. There shall be no order on the civil application.

(karan)